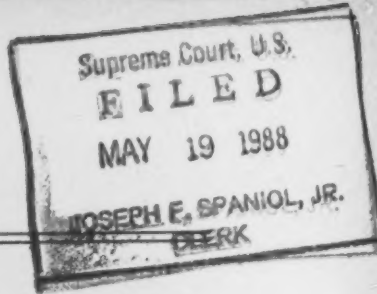


(2)
No. 87-1727



In The
Court of the United States
October Term, 1987

— o —
Great Marwick Main & Co.,

Petitioner,

v.

Thomas Tew
Attorney for ESM Group, Inc., *et al.*,

Respondent.

— o —
Writ of Certiorari To The United States
Appeals For The Eleventh Circuit

— o —
RESPONDENT IN OPPOSITION TO
GREAT MARWICK MAIN & COMPANY
WRIT OF CERTIORARI

— o —
LAWRENCE A. KELLOGG
Counsel of Record
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
(305) 371-2600

BONNIE L. COOPER
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
(305) 371-2600

i

TABLE OF

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

ARGUMENT:

- I. THE ELEVENTH
DOES NOT RAISE
WHETHER INTR
SUPPORT AN INI
FOR RELIEF FROM
- II. THE ELEVENTH
TION OF THE THI
OF RULE 60(b) D
WITH ANY DECIS

CONCLUSION

	Page
.....	ii
.....	1
OPINION	
LICT OF	
UD CAN	
ACTION	
T	1
APPLICA-	
CLAUSE	
ONFLICT	
COURT ...	3
.....	6

Page

2

4

0

4, 5

5

2

ssim

2

8

issue precludes the granting of certiorari to review the opinion below on that basis.

B. Peat Marwick's petition does not challenge the circuit court's analysis of the elements of an independent action for relief from judgment or its determination that Peat Marwick could not establish all of the elements necessary to maintain an independent action. Peat Marwick, therefore, has implicitly conceded that the court applied the proper elements to determine whether an independent action could be maintained and reached an accurate conclusion. For this reason, certiorari to review the court's analysis should not be granted.

II. THE ELEVENTH CIRCUIT'S APPLICATION OF THE THIRD SAVINGS CLAUSE OF RULE 60(b) DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Peat Marwick's second argument challenges the Eleventh Circuit's determination that the actions of ESM's principals and attorney did not constitute "fraud upon the court" within the meaning of Rule 60(b). However, Peat Marwick has once again mischaracterized the holding of the Eleventh Circuit by stating that the court wrongfully concluded that "*subornation* of perjury by trial counsel do[es] not constitute 'fraud upon the court.'" [emphasis added]. *Subornation* of perjury by ESM's attorney was never alleged in Peat Marwick's Amended Proof of Claim; nor was *subornation* of perjury addressed by the Eleventh Circuit. The allegations against ESM's counsel include that he: (1) provided false financial statements; (2) vouched for the credibility and integrity of ESM's principals when he knew of the ESM fraud; and (3) ten-

dered per
these alleg
of suborna
defines sub
ing or ind
perjury]."
Only if ES
perjured t
of perjury
devoid of
role in the
be offered.
ment upon
basis for
Certiorari.

Additi
the Eleven
Court's de
Empire Co
are easily
In *Hazel-A*
rect partic
opposing p
The fraud
basis and
falsely pre
in the fiel
relied on t
His active
article, the
reliance up
led the Co

ringement and to the inescapable conclusion that "fraud on the court" had occurred.

The acts allegedly committed by ESM's counsel fall far short of the egregious conduct of the attorney in *Hazel-Atlas*. The Eleventh Circuit analyzed the alleged misconduct of ESM's counsel and correctly concluded that his actions did not constitute "fraud on the court." As the Eleventh Circuit determined, the allegations against ESM's counsel merely show that he may have known of potential defenses available to Peat Marwick, which he is under no duty to disclose. (Pet. App. p.7a). Failure to inform the opposing party of information helpful to his defense is not fraud upon the court that can be asserted to set aside judgment one year after its entry. See *Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 75-1 USTC ¶13,077 (5th Cir. 1980).

Peat Marwick asserts that its ignorance of the ESM fraud had two separate effects on the trial, which allegedly undermined the integrity of the court proceedings. First, Peat Marwick complains that it could have impeached ESM's witnesses had the truth been known. Second, it argues that ESM could not have relied on Peat Marwick's audited financial statements when ESM's own financial statements reflected the same fraudulent and deceptive treatment of related-party transactions. When extended to its logical conclusion, the absurdity of this argument becomes clear, as the Eleventh Circuit apparently recognized. If one cannot be deceived by the actions of another when he has deceived another in the same manner, then a murderer could never be murdered. The illogic of this argument—which is essential to Peat Marwick's

claim—is inescapable. Peat
have the judgment entered
the money repaid because
which is wholly irrelevant
Peat Marwick. Peat Marv
that ESM defrauded many
the money paid to ESM in
tained against Peat Marwic

Peat Marwick is asking
negligent conduct simply
negligent conduct was defra
Circuit properly recognized
taining relief from judgment

CONC

For these reasons, the F
tiorari should be denied.

May 17, 1988

R
L
T
70
M
(
B

